

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO Q-05-
66 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND HAIDAR JJCA
14 MAY 2001

B ***Criminal Procedure** — Summing up — Assessors — Defence of grave and sudden provocation — Whether judicial commissioner correctly directed assessors on defence — Penal Code ss 300 exception 1 & 302*

The appellant was charged and convicted for the offence of murder and sentenced to death under s 302 of the Penal Code ('the Code'). The appellant appealed and his counsel relied on the ground that the judicial commissioner at the trial failed to sufficiently direct the two assessors as to the defence of provocation made pursuant to Exception 1 of s 300 of the Code. The appellant had during the trial given evidence that he was, inter alia, deprived of his power of self control by grave and sudden provocation when the deceased bit his tongue which had caused him immense pain and in retaliation he badgered her head with a stone. In her summing up, the judicial commissioner gave particular directions on the defence of grave and sudden provocation which ran from pp 25–30 of her 35 page notes of summing up. There, the judicial commissioner had stated the effect of the defence on the prosecution's case and that the burden was on the appellant to prove the defence on a balance of probability. She also went on to state that there were three exceptions to the defence as provided in the Code and supported the exceptions by illustrations and further explained the meaning of the right of private defence. She ended her summing up by stating that what amounted to grave and sudden provocation was a question of fact, ie whether the accused was deprived of the power of self control by grave and sudden provocation when the deceased bit the accused's tongue, causing the accused intense pain, and hence the accused lost his self control which resulted in the accused hitting the deceased with the stone. The assessors, based on the summing up had affirmed the question that the prosecution had proved beyond all reasonable doubt that the wounds on the deceased caused by the accused was not caused when the accused was deprived of the power of self control by grave and sudden provocation. The accused appealed and the question was whether the above provisions had been sufficiently directed by the learned judicial commissioner in the course of her summing up to the assessors.

Held, dismissing the appeal and confirming the conviction and sentence:

I Having read the summing up in its entirety, the court could not see where the judicial commissioner had gone wrong in her directions to the assessors as to the defence of grave and sudden provocation. The court found that the judicial commissioner had correctly outlined the

evidence of the prosecution's case to the assessors, in particular the evidence of provocation. She had appraised the assessors as to the defence of grave and sudden provocation and left the matter of deciding as to whether the appellant had been deprived of his power of self control entirely to the assessors. Under these circumstances, the appellant had been given a fair trial and the offence of murder had been proven against the appellant in accordance with the law. The court had no justifiable reason to disturb the findings of the trial judge (see p 615D–F).

[Bahasa Malaysia summary]

Perayu telah didakwa dan disabit di bawah kesalahan membunuh dan telah dihukum mati di bawah s 302 Kanun Keseksaan ('Kanun tersebut'). Perayu merayu dan peguamnya berhujah bahawa pesuruhjaya kehakiman perbicaraan tersebut gagal mengarah kedua-dua jurutaksir mengenai pembelaan pembangkitan marah yang dibuat menurut Kecualian 1 kepada s 300 Kanun tersebut. Perayu telah, antara lain, semasa perbicaraannya memberi keterangan bahawa beliau kehilangan kawalan sendiri oleh kerana dibangkit marah dengan serius dan secara tiba-tiba setelah si mati mengigit lidah beliau yang menyebabkan rasa yang sangat sakit, dan sebagai balasan, beliau menghentak kepala si mati dengan batu. Dalam pengulungan beliau, pesuruhjaya kehakiman tersebut telah memberi arahan-arahan yang tertentu mengenai pembelaan pembangkitan marah yang serius dan secara tiba-tiba yang bermula daripada ms 25–30 dari nota pengulungan beliau yang sepanjang 35 muka surat. Di dalam nota-nota tersebut, pesuruhjaya kehakiman telah menyatakan kesan pembelaan tersebut pada kes pendakwa raya dan juga beban pembuktian jatuh ke atas perayu untuk membuktikan pembelaan tersebut pada imbalan kebarangkalian. Beliau juga telah menyatakan bahawa terdapat tiga kekecualian kepada pembelaan seperti mana yang diperuntukkan di dalam Kanun tersebut, dan telah menyokong kekecualian tersebut dengan ilustrasi-illustrasi. Beliau seterusnya menerangkan makna hak pembelaan persendirian (private defence). Beliau telah menamatkan pengulungan tersebut dengan menyatakan bahawa apa yang dimaksudkan dengan pembangkitan marah yang serius dan secara tiba-tiba adalah persoalan fakta, iaitu sama ada tertuduh kehilangan daya kawalan sendiri oleh kerana dibangkit marah dengan serius dan secara tiba-tiba setelah si mati menggigit lidah tertuduh yang menyebabkan tertuduh merasa kesakitan yang amat, dan oleh itu tertuduh hilang kawalan sendiri beliau dan menghentak si mati dengan batu. Jurutaksir-jurutaksir, berdasarkan pengulungan telah mengesahkan bahawa pendakwa raya telah membuktikan kes beliau melepasi ragu-munasabah bahawa luka-luka si mati tidak disebabkan oleh tertuduh setelah hilang daya kawalan sendiri yang disebabkan oleh pembangkitan marah yang serius dan secara tiba-tiba. Perayu merayu dan

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- A persoalannya adalah sama ada peruntukkan seperti di atas telah diarahkan dengan betul kepada jurutaksir-jurutaksir oleh pesuruhjaya kehakiman semasa penggulungan beliau.
- B **Diputuskan**, menolak rayuan tersebut dan mengesahkan sabitan dan hukuman tersebut:
Setelah membaca keseluruhan penggulungan tersebut, mahkamah tidak dapat melihat kesalahan pesuruhjaya kehakiman di dalam arahan beliau kepada jurutaksir-jurutaksir mengenai pembelaan bangkitan marah serius dan secara tiba-tiba. Mahkamah mendapati bahawa pesuruhjaya kehakiman telah menggariskan keterangan kes
- C pendakwaan kepada jurutaksir-jurutaksir, khususnya keterangan bangkitan marah. Beliau telah menaksir kepada jurutaksir-jurutaksir mengenai pembelaan bangkitan marah yang serius dan secara tiba-tiba, dan telah meninggalkan persoalan sama ada perayu telah hilang kawalan sendiri beliau kepada jurutaksir-jurutaksir. Memandangkan keadaan ini, perayu telah diberi perbiacaraan yang adil dan kesalahan membunuh telah dibuktikan terhadap perayu menurut undang-undang. Mahkamah tidak mempunyai alasan yang boleh dijustifikasikan untuk menukar keputusan hakim perbicaraan (lihat ms 615D–F).
- E **Notes**
For cases on summing up for assessors, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3662–3663.
- F **Legislation referred to**
Penal Code ss 85, 300, 302
Appeal from: Criminal Trial No 45–09 of 1995 (High Court, Miri)
Narmal Singh (*Narmal Singh & JB Singh*) for the appellant.
- G *Hashim bin Hamzah* (*Sulaiman bin Ibrahim* with him) (Deputy Public Prosecutors) for the respondent.
- H **Siti Norma Yaakob JCA** (delivering judgment of the court):. The appellant was charged and convicted for the offence of murder and sentenced to death under s 302 of the Penal Code. In appealing against both his conviction and sentence, the appellant cited 13 grounds in his petition, but before us, his assigned counsel, Mr Narmal Singh, was content to rely on only one ground. That ground relates to the issue as to whether the judicial commissioner had failed to direct the two assessors as to the defence of provocation.
- I The victim in this senseless killing was a 17 year old sales assistant who worked at a supermarket called Pelita Supermarket in Miri. At the time of her death, she was staying with her aunt and uncle at Kampong Dayak,

Canada Hill, not far from the supermarket. She would leave the house at 8 am every morning for the supermarket and return home the same day at 9.30 am by using a foot path at Canada Hill.

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On the morning of 2 November 1992, passers by discovered her half naked body in a drain at the foot of Canada Hill. Her aunt who identified her at the scene testified that the deceased never reached home the night before. Likewise, the deceased's Section Supervisor at Pelita Supermarket who also identified her at the scene, confirmed that she had left the supermarket just before 9 pm the previous night but never reported for work the next day, ie on 2 November 1992.

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The investigating officer, PW20, recovered a number of personal items at the scene but of particular interest were the following found on the body of the deceased:

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- (1) hair near the stomach area of the deceased;
- (2) hair at the left thigh and near the buttock region of the deceased;
- (3) hair in the deceased's left hand;
- (4) bamboo leaves in the deceased's vagina.

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On 6 November 1992, Dr Hajjah Sardar Jehan, a forensic pathologist conducted a post mortem at the hospital mortuary in the presence of the investigating officer and recovered the tip of a tongue from the deceased's mouth. Dr Hajjah Sardar Jehan never got to produce her post mortem report as she died before the trial commenced. In her place, her colleague, one Dr Jamil bin Dolkadir @ Abdul Kadir, PW26, produced and explained the post mortem report instead.

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Following police investigations, the appellant was arrested at a logging camp on 8 November 1992, at 1 am, six days after the deceased's body was discovered at Canada Hill. A physical examination of the appellant done by Dr Aliousas Silva, PW25, the next day showed:

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- (1) that he had multiple superficial abrasions all over his body except his face;
- (2) that he had three deep abrasions or scratch marks about a week old on the anterior front portion of his body;
- (3) that he had four abrasions on his penis;
- (4) that the tip of his tongue measuring 1 cm had been amputated. There is evidence that such amputation was not self inflicted as the edges were pointing outwards. The cross examination of PW25, recorded the following evidence:

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'The tongue is a very sensitive organ of the body. It is painful if we bite our own tongue. This is because the tongue area has a lot of nerves. If the tongue is bitten and a portion is cut off, my experience there would be severe pain, normally it would last three to four days.'

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PW25 also took samples of the appellant's blood for cross matching as well as samples of his nail clippings, his pubic hair and head hair.

A Expert evidence on the samples of the appellant's hair was given by the chemist, PW23, who testified that:

(1) the hair found in the deceased's left hand matched the sample head hair taken from the appellant. The presence of hair root in the hair found in the deceased's left hand was consistent with the hair being forcibly pulled.

B (2) the hair found on the deceased's left buttock also matched the sample pubic hair taken from the appellant.

C There was also corroborative evidence given by the appellant's aunt, PW3, with whom the appellant had stayed from October to November 1992, that on the night of 1 November 1992, she had opened the door to let the appellant into the house. She noticed that he was drunk and bleeding from the mouth. He admitted to her that he was involved in a fight and that he had raped a girl.

D The appellant's mistress, PW4, also testified that she found him bleeding from the mouth on the night of 1 November 1992, and that his shirt was soaked with blood.

E The medical evidence showed that the deceased had been raped and suffered extensive injuries to the head. The whole of her upper right skull was fractured at three places and was smashed in. Her base skull was also fractured and was broken in two parts, front and back. The intracranial area which would normally contain brain fluid was filled with blood due to massive bleeding. The cause of death was due to multiple comminuted fractures of the skull with intracranial haemorrhages. Such extensive internal injuries according to PW26, the doctor who explained the post mortem report, can cause immediate death with no chance of survival.

F The nature of the deceased's injuries was also consistent with her being badgered with a hard object and in this respect there is the undisputed evidence of PW20 of his recovery from the scene three pieces of broken stones near the deceased's legs. He also noticed blood stains at the spot where the stones were found.

G From the evidence, it was clear that the prosecution relied purely on circumstantial and corroborative evidence to implicate the appellant to the charge of murder. The judicial commissioner found such circumstantial and corroborative evidence to be overwhelming, a finding that we entirely endorse and she called upon the appellant to enter his defence to the amended charge of murder. For completeness we need to mention that the prosecution had also succeeded in admitting the appellant's cautioned statement, but we say that even in the absence of such cautioned statement there was more than sufficient circumstantial evidence to support the charge of murder.

H The appellant elected to give evidence on oath and apart from himself, called no other witness. He admitted killing the deceased but justified his action on the grounds that:

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- (1) he was drunk at the time of the killing and was so intoxicated as to be incapable of forming the required intention to kill, a defence under s 85 of the Penal Code; and **A**
- (2) that he was deprived of his power of self control by grave and sudden provocation when the deceased bit his tongue which caused him immense pain, and in retaliation he badgered her head with a stone. This defence was made pursuant to exception 1 of s 300 of the Penal Code. **B**

It was in respect of the second defence that we were concerned with in this appeal, and the objection taken was that there had been a misdirection when the judicial commissioner failed to direct the assessors as to the defence of grave and sudden provocation. **C**

Exception 1 to s 300 contains the following provisions:

Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person, who gave the provocation, or causes the death of any other person by mistake or accident. **D**

The above exception is subject to the following provisos:

- (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
- (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant; **E**
- (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact. **F**

The question posed before us was whether the above provisions had been sufficiently directed by the learned judicial commissioner in the course of her summing up to the assessors. Her summing up runs to 35 pages of typewritten notes. In particular, directions on the defence of grave and sudden provocation runs from pp 25–30. She begins by stating the effect what that defence has on the prosecution's case and that the burden is on the appellant to prove that he was gravely and suddenly provoked, that he lost his self control when the deceased bit his tongue. She also explains that the burden is a light one as all the appellant needed to prove was on a balance of probability. She then proceeds to explain that the defence is subject to three exceptions, as provided for by the Penal Code, and she supports those exceptions by illustrations. She also explains the meaning of the right of private defence, and she ends her summing up with the following words: **G**

Gentlemen assessors, **H**

The defence put forward in this case is that of grave and sudden provocation. I have summed up to you what constitutes grave and sudden provocation. You have heard the evidence of both the prosecution and the defence. The defence's story is that the deceased, in biting the accused's tongue, caused him **I**

- A intense pain and hence the accused lost his control which resulted in him hitting the deceased and causing her death. It has been submitted on his behalf by his counsel that the accused only realized the object he picked up was a stone after the incident, and if the accused had really wanted to kill the deceased he would have prepared himself then. Therefore, the accused acted on the spur of the moment whilst deprived of his power of self control under grave and sudden provocation.

B Gentlemen assessors,

- C Let me remind you again that what amounts to grave and sudden provocation is a question of fact. As judges of fact, it is for you to decide whether in this case the accused was deprived of the power of self control by grave and sudden provocation. In so deciding you have to look at the evidence adduced in this trial and ascertain for yourselves, as judges of fact, whether the evidence shows that the accused was deprived of his power of self control by grave and sudden provocation.

- D It was based on that summing up that both assessors affirmed the question put to them 'that the prosecution had proved beyond all reasonable doubt that the fatal wounds found on the body of the deceased, Senya ak Belong, caused by the accused were not caused whilst the accused was deprived of the power of self-control by grave and sudden provocation.

- E We have read the summing up in its entirety and we cannot see where the judicial commissioner had gone wrong in her directions to the assessors as to the defence of grave and sudden provocation. We found that she had correctly outlined the evidence of the prosecution's case to the assessors, in particular the evidence of provocation. She had appraised the assessors as to the defence of grave and sudden provocation and left the matter of deciding as to whether the appellant had been deprived of his power of self control entirely to the assessors. Under these circumstances, we consider
- F that the appellant had been given a fair trial and that the offence of murder had been proven against the appellant in accordance with the law. As we had no justifiable reason to disturb the findings of the trial judge, we had dismissed the appellant's appeal and confirmed his conviction and sentence.

- G *Appeal dismissed and conviction confirmed.*

Reported by Chew Phye Aun

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